STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Z-TEL COMMUNICATIONS, INC.	}	
	}	
Complainant	}	
	}	
vs.	}	**Docket No. 02-0160**
	}	
ILLINOIS BELL TELEPHONE COMPANY, d/b/a AMERITECH ILLINOIS	}	
	}	
Respondent	}	

Z-TEL COMMUNICATIONS, INC.'S RESPONSE TO AMERITECH'S PETITION FOR REVIEW OF THE ALJ'S DECISION

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RESPONSE TO AMERITECH'S PETITION FOR REVIEW OF THE ALJ'S DECISION

Z-Tel Communications, Inc., by its attorneys O'Keefe, Ashenden, Lyons and Ward, pursuant to Section 13-515(d)(8) of the Illinois Public Utilities Act, 220 ILCS 5/13-515(d)(8) (hereinafter referred to as the "Act"), states as follows for its Response to the Petition for Review filed by Ameritech.

Ameritech's Petition for Review raises essentially 3 arguments. First, Ameritech asserts that the Decision erred because, under Ameritech's theory, Ameritech can be held liable under Section 13-514 only if it commits conduct with the specific intent to impede competition. Second, because Ameritech believes that it can not be found to have violated Section 13-514, Ameritech argues that it cannot be ordered to modify the "line disconnect" information that Ameritech provides to its competitors to be equal to the information that Ameritech provides to its retail operations. Instead, Ameritech recommends that the Commission reduce the information that is made available to Ameritech's Winback marketing group, to be equal to the information that is made available to Z-Tel. Finally, Ameritech argues that the Commission cannot assess penalties under Section 13-305. Z-Tel requests that the Commission reject

Ameritech's arguments, and affirm the ALJ's Decision as modified by Z-Tel's Petition for Review.

I. THE DECISION PROPERLY FINDS THAT AMERITECH HAS VIOLATED SECTION 13-514 AND SECTION 13-801 OF THE ACT. (Responding to Ameritech Petition, p. 2-7.)

Ameritech's Petition for Review first argues that the Decision erred by finding that Ameritech's conduct violated Section 13-514 of the Act. It does so with two arguments: first, Ameritech argues that the Decision did not analyze its intent to commit acts that the Legislature has declared to be *per se* violations. Second, Ameritech contends that there is no proof in this proceeding that it acted unreasonably – despite the volumes of Z-Tel requests for corrective action and Ameritech's pattern of denial and delay.

Ameritech first contends that it cannot be held liable under Section 13-514 because, even assuming it did engage in the purported conduct of delivering defective and discriminatory Operations Support Systems (OSS) information to Z-Tel, Ameritech did not intend to impede competition. Ameritech made the identical argument to the Administrative Law Judge, which properly rejected Ameritech's construction of Section 13-514.

Central to Ameritech's position is its claim that "[a] telecommunications carrier violates Section 13-514 only if it "knowingly" impedes the development of competition by unreasonably committing one or more of the enumerated prohibited acts or another unreasonable act," (Ameritech Petition, p. 2.) Not surprisingly, Ameritech does not quote Section 13-514 in its argument, and its paraphrase does not properly characterize the language of Section 13-514. Section 13-514 provides that a "telecommunications carrier shall not *knowingly impede* the development of competition . . . ." 220 ILCS 5/13-514. Without regard to any other provision of Section 13-514, the Commission could (and should) find Ameritech's conduct in this case to

violate Section 13-514. However, the Illinois legislature has simplified the Commission's analysis under Section 13-514 because it has enumerated 12 categories of conduct that are declared to be *per se* acts that impede competition: "The following prohibited actions are considered per se impediments to the development of competition." 220 ILCS 5/13-514. The plain text of the statute makes clear that the Commission does not need to reach of finding of Ameritech's intent so long as it finds that Ameritech violated one of the 12 specifically-enumerated *per se* categories of conduct.

Z-Tel has alleged and proven in this case several *per se* violations of Section 13-514 by Ameritech. Ameritech's intent is irrelevant and the Commission does not have to find that Ameritech acted with knowledge that its actions would impede competition. The legislature has already concluded that if a carrier is found to have engaged in the conduct set forth in subparagraphs (1) through (11), that conduct is so manifestly anticompetitive, such conduct is *per se* in violation of Section 13-514.

The use and legal impact of *per se* principles by legislatures and courts is well-recognized. As Z-Tel pointed out in its Reply Brief, Section 13-514 of the Act is a statute that is *malum prohibitum*, it declares conduct unlawful regardless of Ameritech's intent *See People v. White Bros. Equipment Co.*, 63 Ill. App. 3d 445, 450, 380 N.E. 2d 396 (5th Dist. 1978.) In *Northern Pacific R.R. Co. v. United States*, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958), the Supreme Court explained the usefulness of *per se* rules in the context of antitrust law. The court stated

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act

> more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable -- an inquiry so often wholly fruitless when undertaken."

See also National Super Markets, Inc. v. Magna Trust Company, 212 Ill. App. 3d 358, 362, 570 N.E.2d 1191 (5th Dist. 1991) (quoting *Northern Pacific*.) By specifically using the legal term of art "*per se*" in Section 13-514, the Legislature clearly intended that these common legal use of that term (in antitrust law, libel law, etc.) applies. Ameritech's interpretation of Section 13-514 would literally read out the words "*per se*" from the statute.

The Decision concludes that Ameritech engaged in conduct that is prohibited by Sections 13-514(2), (6), (9) and (11). Because Ameritech engaged in conduct that has been deemed to be a *per se* violation of Section 13-514, there is no need for the Commission to find that Ameritech either intended to impede competition, or acted in a way that it knew it was impeding competition.

Ameritech also argues that there is no proof in the record for the ALJ to conclude that Ameritech's conduct here was unreasonable. According to Ameritech, it acted reasonably because it was in the process of fixing the line loss notice issues at the time Z-Tel filed its complaint. The Decision addressed this argument, and properly held that:

> [i]t is evident, though, that multiple problems have been identified for more than a year and Z-Tel has shown that not only does Ameritech provide itself with different and arguably better enhanced LLN, but that this enhanced LLN has given Ameritech a competitive marketing advantage.

Decision, p. 18. Ameritech dismisses the Decision's conclusion by asserting that it corrected 5 system defects between January and July 2001, and that there were additional defects that were latent in the system that were not apparent to Ameritech until significant volumes of CLEC to

CLEC migrations began to occur. (Ameritech Petition, p. 4-5.) However, Ameritech's Petition then goes on to describe that even after July 2001, there were additional problems that were caused by manual errors by service representatives. Ameritech then acknowledges that the processes that gave rise to these problems were not fixed until April 24, 2002.

Ameritech's Petition ignores the long history of complaints made by Z-Tel to have the 836 LLN process fixed, and the recent discovery that Ameritech was discriminating against Z-Tel in the provision of OSS information to its retail operations. For example, one of the problems Z-Tel identified to Ameritech is the misidentification of codes used by Ameritech to signal a lost line. An 836 LLN should only contain a "D" (disconnect) or "C" (change) on the notice. However, Ameritech was sending 836 LLN with "D", "C", and "N" (new install) and "S" (suspend order) codes as far back as June, 2001. Ameritech Br. p. 13. Z-Tel had complained about this problem to Ameritech since at least June 18, 2001. Z-Tel Exh. 1.1, p. 6-7. However, Ameritech's Schedule F of defects notes that the first time Ameritech "identifies" this as a problem is December 2001. Schedule F, item 18. Ameritech identifies several other defects that cause the same problem for Z-Tel, and does not fix the problems until at least March 16, 2002, after this complaint was filed. Schedule F, item 19. More than 9 months pass from the time that Z-Tel first complains about "N" orders being intermingled with the 836 LLN report, and the time that Ameritech finally cures that problem. Moreover, Ameritech admitted during the proceeding that there are at least 24 known defects in the 836 LLN process. Schedule F.

Z-Tel began having problems with the 836 LLN in *December, 2000*. As of December 20, 2000, Z-Tel was serving customers in Illinois for over 2 months, yet at that time, Z-Tel still had not received an 836 LLN from Ameritech. Z-Tel contacted Ameritech to complain about the lack of notice. Z-Tel Exh. 1.1, p. 1. A "reasonable" response by Ameritech would have been a

statement to the effect that they would investigate the problem, and identify whether there were any problems. Instead, Ameritech's asked Z-Tel to provide a list of customers that Z-Tel knew had migrated to another carrier. Id. Of course, Ameritech new at the time that Z-Tel does not know when a customer leaves their network until they receive the 836 LLN! Rather than try to solve the defect in Ameritech's own OSS systems, Ameritech's attempt at a solution was to punt the problem back to Z-Tel until Z-Tel came up with information that it could not reliably have without the 836 LLN. To help find a solution, Z-Tel created a "beta" test customer, or a test line that Z-Tel could disconnect, know the date of disconnection, and provide that information to Ameritech. Ameritech did not provide its first set of 836 LLN's to Z-Tel until February 8, 2001.

The next identifiable problem arose in May 2001 when Z-Tel received blank 836 LLNs. Ameritech Br. p. 16-17. After almost daily inquiries Ameritech's representative informed Z-Tel that Ameritech "now conclude that AIT methods, procedures and processes regarding provisioning of loss accounts has broken down." Z-Tel Exh. 1.1, p. 4. Mike Scipio also noted that he had discovered that the 836 LLN process "had not been working properly since October [2000.]" Id. Finally, on June 5, 2001, Z-Tel received 836 LLN's reports for the entire period from April 30, 2001 through June 4, 2001. Id. These problems continued through June 2001. On May 31, 2001 Ameritech had an executive level conference call to discuss the 836 LLN failures. Id. At the latest, by May 31, 2001 Ameritech management was put on notice of the significant and recurring defects and problems with its 836 LLN. Then, on June 5, 2001, Z-Tel sent an email to the President and Senior Vice President of SBC's Industry Market's Business Unit (the SBC wholesale unit) to formally escalate Z-Tel's continuing problems with the defective 836 LLN. Ameritech Cross Ex. 1, page Z-00086. At the very latest, Ameritech senior wholesale executives had knowledge of the defects and methods and procedures problems it was

having with its OSS systems by June 5, 2001. On June 7, 2001 Z-Tel learned that over 500 change order requests (request to change the service on a Z-Tel customer line) had been rejected because, unbeknownst to Z-Tel, the customers were no longer Z-Tel customers. Id. Z-Tel was unaware that the customers had migrated to other carriers, because it was not receiving timely or accurate line loss information.

That litany of facts was fully-established at the hearing. Yet despite this evidence, Ameritech's Petition boldly and incorrectly states that "[s]everal of the system defects were identified only after Ameritech began its comprehensive investigation" and problems were "latent defects that were not readily apparent to Ameritech or its customers." (Ameritech Petition, p. 5.) Ameritech's Petition even goes so far as to say that they acted "promptly and appropriately." (Ameritech Petition, p. 5.) The record shows otherwise, and the Decision justifiably concludes that Ameritech, on notice of systemic and recurring problems since at least (being generous to Ameritech) June 5, 2001, should have established a process to investigate and cure the problems prior to 2002. The record shows that senior Ameritech executive personnel were aware of the LLN problem in early 2001 and ignored those problems. This lack of action by Ameritech is unreasonable.

Finally, Ameritech's Petition proposes to provide its Winback group the 836 LLN as a solution to the discrimination found by the ALJ. The Commission should be aware that this offer is patently insufficient, given Ameritech's pattern of misconduct. During the time that Z-Tel was experiencing its problems, Ameritech's retail business unit was receiving the 836 LLN, but stopped using that notice for its retail purposes when it designed its own "line disconnect" notice in June 2000, expressly for the purpose of engaging in Winback marketing. Despite recurring complaints from CLECs and the Michigan Public Service Commission, and despite

Ameritech's identifying over 30 problems with the 836 LLN process, Ameritech never indicated that it was possible for Ameritech to provide competitors with that disconnect notice as an alternative to the 836 LLN (which Ameritech knew was defective.) In other words, Ameritech had – for its own retail marketing purposes – developed a new line disconnect OSS that it hid from competitors like Z-Tel. Such conduct violates Section 13-514 and cannot be remedied simply by reversing course and pretending that this superior OSS was never developed.

With respect to the Decision's conclusion that the line disconnect notice that is used by Ameritech's Winback marketing group is discriminatory, Ameritech's Petition states that "only three fields are necessary to the line loss notification process: the telephone number or circuit ID of the line being disconnected and the date of loss." Ameritech then argues that it would agree to now (actually, by the end of May after the 836 LLN process is fixed) use the 836 LLN and no longer use the other form of disconnect notice. The Decision properly concludes that Ameritech does not get the option of choosing for Z-Tel what OSS information Z-Tel should receive, or how Z-Tel should use that information. Ameritech's effort and suggestion to limit the OSS information that is made available to Z-Tel is discriminatory both in design and in effect.

To appreciate the proper conclusion drawn by the ALJ in her Decision, the Commission should be aware of the particularly pernicious nature of Ameritech's use of this "disconnect notice" given to its Winback Group. The 836 LLN given to Z-Tel has the telephone number, and the date of disconnect. The superior "Winback" disconnect notice used by Ameritech-retail is created specifically for the Ameritech Winback Group by filtering information from the mirror record of the ASON file; after the ASON file is delivered to Ameritech's retail business unit the

Service Order Interface and other filters ultimately generate the "line disconnect notice" used by the Winback Group.[1]

The Ameritech Winback line disconnect notice provides information to the Winback Group about the "winning" carrier, such as whether the winning carrier is a UNE-P CLEC, a reseller, and UNE CLEC, a rebundled customer, and whether the Ameritech customer was lost to competition. Z-Tel Cross Exh. 7; Z-Tel Cross Exh. 5. The current form of the 836 LLN does not have this information. The 836 LLN used to have information about the winning carrier, but Ameritech redesigned the 836 LLN in June 2000 to eliminate that information from the 836 notice. At the same time, it designed the Winback line disconnect information for its Winback marketing group that did contain information about the winning carrier. This begs the question: why would Ameritech design a disconnect notice for its Winback marketing group that includes information about the CLEC to which its customer migrated? Why would Ameritech redesign the 836 LLN to exclude that information, at the same time it designed the Winback line disconnect notice? The Decision properly concludes that Ameritech's conduct here is unreasonable. It is a violation of Section 13-514 and 13-801 for Ameritech to provide its own Winback marketing group information about the winning CLEC when an Ameritech customer migrates to Z-Tel, and not provide that information to Z-Tel.[2]

[1] The Commission should note the difference between the information on the ASON record, which Z-Tel's Petition for review requests be provided to Z-Tel on a nondiscriminatory basis, and the line disconnect notice provided to the Winback Group. The ASON record contains roughly 19 categories of information (see Petition for Review, p. 14.)

[2] Z-Tel has no desire to get any information on the carrier that "wins" one of its customers. That is why Z-Tel has insisted that it does not necessarily want to get the "line disconnect notice" that is currently used by Ameritech Winback (although it would prefer a working disconnect notice of any kind.) Z-Tel believes the appropriate resolution is to order Ameritech to provide Z-Tel with the same ASON record file provided to Ameritech's retail business unit.

II. THE COMMISSION SHOULD REJECT AMERITECH'S ARGUMENT TO REDUCE THE OSS INFORMATION MADE AVAILABLE TO CLECS. (Responding to Ameritech's Petition, p. 7-8.)

Ameritech argues that the Decision erred because it ordered Ameritech to provide Z-Tel with the same disconnect notice that Ameritech provides to its Winback marketing group. According to Ameritech, it has already committed to discontinuing that disconnect notice to its own Winback group when the group is able to rely upon the 836 LLN, which will occur by the end of May, 2002. Because Ameritech's Winback Group will be using the 836 LLN in June, Ameritech contends that there is no reason to force it to provide the other form of disconnect information to Z-Tel.

Z-Tel opposes Ameritech's suggestion that the solution to cure the discrimination in providing OSS information is to reduce the information that is made available to its Winback Group. As Z-Tel has made clear in its Petition for Review, Z-Tel believes that the test of whether Ameritech complies with Sections 13-514 and 13-801 is whether Ameritech provides Z-Tel with the same set of information that is made available to Ameritech's retail business units, not the Ameritech Winback Goup. Ameritech argues that 1) it will in the future reduce the information provided to the Winback Group, and that 2) Z-Tel should be limited only to that information. Ameritech's proposal completely ignores the clear fact that its *retail* group receives considerably more information when the mirror record of the ASON record is sent to the Service Order Interface. Z-Tel should not be forced to be satisfied with a subset of this information.

Z-Tel also strenuously rejects Ameritech's proposal in its footnote at page 8 that until Ameritech's Winback Group begins using the 836 LLN that it be allowed to continue to rely upon the discriminatory form of disconnect notice to winback customers. (Ameritech Petition, p. 8, fn. 3.) Ameritech suggests that it be permitted to use the discriminatory form of disconnect

notice *that was designed specifically to market to Z-Tel's customers* after the Commission rules Ameritech has violated Sections 13-514 and 13-801 by providing that notice only to its Winback Group. The Commission's should soundly reject Ameritech's outrageous offer that the Commission specifically approve of a continuing violation after the Commission's decision in this case. The Commission should make clear that until a mirror copy of the ASON record is made available to Z-Tel in a nondiscriminatory way, that Ameritech cannot use any of that ASON information to winback customers.

The Commission should further reject Ameritech's proposal to force Z-Tel to rely only on the 836 LLN, and instead should adopt Z-Tel's proposal to compel Ameritech to provide Z-Tel with a mirror copy of the ASON record.

III. AMERITECH IS SUBJECT TO PENALTIES UNDER SECTION 13-305 OF THE ACT. (Responding to Ameritech's Petition, p. 8-11.)

Ameritech argues that the Commission should modify the Decision to eliminate any finding of penalties under Section 13-505 of the Act. Ameritech first argues that there is no proof that Ameritech was unreasonable in its alleged failure to correct the line loss problems. In addition, Ameritech argues that when the complaint was filed, Ameritech was in the process of eliminating the line loss defects and errors, and therefore penalties would be inappropriate. Finally, Ameritech argues that the structure of the Act contemplates that violations of Section 13-801 be subject to penalties only under Section 13-515, not under Section 13-305. Ameritech asserts that "a violation of Section 13-801 may only be asserted in a Section 13-515 proceeding. . . ." (Ameritech Petition, p. 10.)

The Decision should have imposed penalties on Ameritech pursuant to Sections 13-305 and 13-515. However, the Decision correctly applied the provisions of Sections 13-304 and 13-305 to impose penalties for violations of Sections 13-801. Section 13-305 of the Act provides:

> Sec. 13-305. Amount of civil penalty. A telecommunications carrier . . . that violates or fails to comply with any provisions of this Act . . . in a case in which a civil penalty is not otherwise provided for in this Act . . . shall be subject to a civil penalty imposed in the manner provided in Section 13-304 of no more than $30,000 or 0.00825% of the carrier's gross intrastate annual telecommunications revenue, whichever is greater, for each offense unless the violator has fewer than 35,000 subscriber access lines, in which case the civil penalty may not exceed $2,000 for each offense.
>
> 220 ILCS 5/13-305.

The Decision finds that Ameritech's conduct violates Section 13-514 as well as Section 13-801. Violating Section 13-801 gives rise to an independent violation of Section 13-514(11), but it can, by itself, give rise to a cause of action that will bring a penalty under Section 13-305.

Ameritech's claim that penalties can be imposed for a violation of Section 13-801 only on complaints under Section 13-514 would, if accepted by the Commission, produce a result that would allow Ameritech to escape any penalty under Section 13-305. In future proceedings brought under any section other than Section 13-515, Ameritech could argue that no penalties apply under Section 13-305 because its conduct at issue in that complaint was theoretically also a violation of Section 13-514; therefore, because the Commission did not find that Ameritech violated Section 13-514 for the conduct at issue, no penalties can be imposed under Section 13-305. Ameritech could use the fact that a complaint is not brought under Section 13-515 as a foil to avoid any penalty under Section 13-305. This is clearly not the intent of the statute.

Section 13-305 provides that where a violation of a statute is found, and there is no penalty imposed under another section of the Act to sanction that conduct, Ameritech is subject to penalties under Section 13-305.

Ameritech's remaining arguments should also be dismissed. Ameritech claims that there is no proof that its conduct in violating Section 13-801 was unreasonable because it was repairing the 836 LLN problems while the Complaint was pending. As discussed above, the Decision properly rejects Ameritech's claim. Even Ameritech's own Petition contradicts its claim that by the time the complaint was field it "had already undertaken all necessary steps to eliminate the line loss defects and errors. . . ." (Ameritech Petition, p. 9.) This statement is contradicted by Ameritech's statement on Page 5 of its Petition, that some defects in the system would not be repaired until April 24, 2002.

More to the point, however, the Decision also found that Ameritech violated Section 13-801 because it was providing discriminatory line disconnect information to its Winback marketing group, and this OSS information was more favorable than the information provided to Z-Tel in an 836 LLN. Ameritech was *not* in the process of ceasing that discrimination until after the complaint was filed. Therefore, even assuming that the Commission would conclude that the year-long process to fix the 836 LLN defects does not give rise to penalties under Section 13-305, Ameritech's discrimination in providing more favorable line disconnect information until forced to change that process by the Complaint, does give rise to a violation of Section 13-305.

Wherefore, for each of the foregoing reasons, Z-Tel Communications, Inc. respectfully requests that the Commission affirm the Decision, as modified by the requests made in Z-Tel's Petition for Review.

Respectfully submitted,

Z-TEL COMMUNICATIONS, INC.

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